**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Appropriate Framework for Broadband | ) | |
| Access to the Internet over Wireline Facilities | ) | CC Docket No. 02-33 |
| | ) | |
| Universal Service Obligations of Broadband | ) | |
| Providers | ) | |
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| Computer III Further Remand Proceedings: | ) | CC Docket Nos. 95-20, 98-10 |
| Bell Operating Company Provision of | ) | |
| Enhanced Services; 1998 Biennial Regulatory | ) | |
| Review – Review of Computer III and ONA | ) | |
| Safeguards and Requirements | ) | |

# COMMENTS OF DSLNET COMMUNICATIONS, LLC

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## SUMMARY

The Commission is treading very dangerous ground in this proceeding. On a number of fronts, the ILECs are agitating to be relieved of the regulatory safeguards that thwart their on-going efforts to extend their long-time dominance in the local access market to permanent dominance in the broadband market. DSL.net and others like it have, against great odds, carved a place in the broadband market today and are working hard to assure that they provide a long-term competitive choice to the ILEC broadband offerings. The existing rules are working, and DSL.net and other competitive providers are deploying broadband to meet the Commission's goals. Most importantly, competitive providers are offering consumers a choice in providers, services and prices for their broadband services. The steps proposed in the *NPRM* herein and in other proceedings now before this Commission would seriously set back this emerging competition for years to come and perhaps for good.

The ILECs have pushed for these proceedings on the basis that (1) sufficient competition exists in the provision of broadband services to allow deregulation of the ILEC offerings; (2) absent deregulation, the ILECs will not build ubiquitous broadband networks; and (3) if the ILECs do not build them, no one else will either, so that the public will be deprived of their benefits. The contradiction between premise (1), which presupposes fully effective competition, and premise (3), which presupposes no competition at all, is patent. But based on this incoherent argument, the ILECs are attempting at one blow to extend into the broadband market their local dominance.

In any event, none of these premises is true. Competition for broadband services does exist, in the form of DSL.net and others for small and medium-sized business customers, but the ILECs' retain dominance due to the fact that they are the only entity with the ubiquitous last-mile

facilities on which providers such as DSL.net must still rely. Competition exists today because the regulatory safeguards in place have prevented the ILECs from using this dominance to forestall its emergence. While competition is growing, it is far too early for deregulation of the ILECs' offerings to be justified. Moreover, if deregulation occurs today – and in particular if ILECs are relieved of their unbundling requirements – the emergence of this competition will be stalled and may well be reversed. In addition, the coming convergence of technology to an "all-Internet" network means that the ILECs could use the proposed regime as a way to evade regulation of such core services as voice.

Contrary to the ILECs' second premise, moreover, ILEC deployment of broadband has not been hindered by existing regulation. In fact, ILEC deployment of DSL has grown by leaps and bounds – particularly where competitive pressures of the type presented by the CLECs has outweighed the ILECs desire not to cannibalize their existing narrowband (and, more expensive broadband) services. Given the lack of a killer application in this field, ILECs' deployment has been more than commensurate with the development of demand.

The Commission's legal authority to do what it proposes is also lacking. Title I regulation has been justified in the past as ancillary to jurisdiction under another Title of the Communications Act. Here the Commission proposes to walk the Title I tightrope without a Title II safety net. It is doubtful that the Commission can adopt any meaningful safeguards under Title I alone that would prevent anti-competitive acts by the ILECs. In fact, the ILECs' broadband services clearly fall within the ambit of Title II and the Commission must use Title II as its framework for determining over time how best to regulate in this arena. In addition, the action proposed by the Commission could inappropriately impede the ability of the states to regulate intrastate offerings.

Finally, the Commission's suggestion that existing safeguards are obsolete because broadband technology is new is meritless. The existing safeguards were designed specifically to be broad enough to cover emerging technologies, because the Commission knew that any attempt to tie them to a specific then-existing technology could render them obsolete.

DSL.net urges the Commission to retain the rules that are working today to support maximum broadband deployment in this country. In addition, DSL.net recommends that the Commission conclude this docket expeditiously to eliminate the uncertainty for competitive providers and customers as they make their choice of providers and services.

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**COMMENTS OF**
**DSLNET COMMUNICATIONS, LLC**

DSLnet Communications, LLC ("DSL.net") submits these comments in response to the above-captioned notice of proposed rulemaking examining the appropriate regulatory framework for broadband access to the Internet over wireline facilities.[1]

## I. INTRODUCTION

Incorporated in 1998, DSL.net provides high speed internet access and data communications solutions to small and medium-sized businesses nationwide. DSL.net has a committed focus on the small and medium sized business market. Unlike many providers, who are either facilities based wholesalers of DSL services or resellers with no DSL facilities of their own, DSL.net sells services to businesses directly, through combination of its own broadband

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[1] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, CC Docket No. 02-33, FCC 02-42, released February 15, 2002 ("*NPRM*").

facilities, nationwide network infrastructure and Tier One Internet Service Provider capabilities. DSL.net deploys its own DSL equipment primarily in select second and third tier cities. In first tier cities, and certain other markets, it uses the local facilities of other carriers – including unbundled loops from ILECs -- to provide service. DSL.net is a certified CLEC in all 50 states, as well as Washington, DC, and Puerto Rico, giving the company the ability to deliver a broad array of telecommunications services throughout the United States. In addition to providing DSL connections, DSL.net now provides T1 connections to its customers as well as web hosting; live, continual data backup and recovery; and other services that our customers demand of a service provider to enhance their communications abilities.

The Telecommunications Act of 1996 ("1996 Act") opened the market for providers like DSL.net to offer new, innovative services. DSL.net has worked hard to create a company that serves its customers with high quality service. As a facilities-based provider, DSL.net has worked diligently with the ILECs to establish collocation and to order and install loops to provide the necessary connection to our customers. The process has not been easy. As the Commission established rules to implement the 1996 Act and began to release its orders that implemented the 1996 Act, each of the ILECs interpreted the orders and rules differently, adopting non-uniform methods and procedures, and imposing unnecessary processing layers and lengthy bureaucratic timelines. That process continues to this day. Nevertheless, DSL.net has persevered, overcome the ILEC-imposed process impediments and succeeded in meeting its customers' needs.

DSL.net looks forward to providing our customers with additional services and serving a wider customer base but its ability to do so would be severely harmed by the extreme deregulation of ILEC broadband Internet access services evidently contemplated by the

Commission in the *NPRM*. At long last, the industry has arrived at a reasonably clear understanding of the rules of the road – albeit with some remaining areas of disagreement. Fundamentally changing the rules as the Commission proposes would set our business operations and those of numerous other emerging competitors back to square one. The ILECs will once again take their sweet time to absorb and understand the rules, to impose their own self-serving interpretations on those seeking to do business under them, and to fight to the last ditch contrary interpretations. Needless to say, this would utterly disrupt the relatively stable process that has finally been arrived at after the expenditure of thousands of hours (and millions of dollars) by private entities, this Commission and the courts.

Contrary to the impression the ILECs seek to create, the existing rules remain, practically speaking, very new. Contrary to the ILECs' scare tactics, and despite their attempts to subvert the rules at every turn, the rules are for the most part working, and the Commission should give them a chance to continue to work so that competition from DSL.net and others like it can continue to flower and to provide an alternative to the ILECs' age-old monopoly. DSL.net is addressing the needs of the small and medium sized business market, a market which is not served well by either the ILECs via wireline facilities or cable providers not generally focused in business areas.

There have been recent technological enhancements that now enable the cost effective integration of voice and data over DSL facilities, as evidenced by recent announcements such those of XO Communications[2] and Focal Communications[3]. The innovation of new services, like voice, over these competitive facilities, is a huge threat to ILECs, which have an enormous

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[2] "XO Enhances XOptions Service Packages," April 8, 2002, http://www.xo.com/news/111.html

[3] "Focal Communications Launches Integrated Voice and Data Service," April 25, 2002, http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=FCOM&script=410&layout=-6&item_id=285195

revenue stream generated by their voice products. If CLECs were unable to obtain access at cost-effective rates to these "last mile" facilities – which would be the inevitable result of the "reforms" the ILECs are pushing – consumers would lose competitive choices not just for high speed access but for the additional services that now can be provided over those facilities. ILECs, absent this competition, also have no incentive to offer voice in a more cost-effective manner. They are reaping huge revenues and profits from providing voice over their existing facilities and their strongest incentive is to keep milking those revenues for as long as they can. With no competitive alternative, there would be no reason why they should lower their prices or invest in lower cost alternatives. Thus, the proposed deregulation would actually serve as a *disincentive* for broadband deployment

The rush to judgment portended by the *NPRM* is especially alarming when contrasted with the process for allowing RBOCs into the long-distance marketplace, a process designed to prevent the RBOCs from extending their local dominance into the long distance market. There, the RBOCs must comply with a 14-point checklist prior to entry. These hurdles have been real, as they should be, albeit imperfect, and as a result the process of allowing RBOCs into this market has been careful and deliberative. The *NPRM*, by contrast, would allow all ILECs to complete freedom in the broadband market at one fell swoop, with no analogous measures designed to prevent the ILECs from extending their dominance into the broadband market.

Even the regulatory uncertainty created by the pendency of this proceeding is detrimental and disruptive to the marketplace, as both competitors and their customers react to the churning regulatory environment. ILECs, too, are disserved as they redeploy their resources in pursuit of the regulatory "next big thing" before the "last big thing" has come to fruition. Accordingly,

DSL.net urges the Commission to act quickly to end this proceeding and reject the ILECs' regulatory grab for hegemony in the broadband marketplace.

## II. EXECUTIVE SUMMARY

In the *NPRM*, the Commission seeks comment on the extent to which broadband wireline Internet access services should be regulated by the Commission. DSL.net is concerned that the Commission may in this proceeding erroneously and unlawfully remove key Title II and *Computer Inquiry* obligations from ILECs in the misguided view that this would promote its goal of provision of broadband services to all Americans. In fact, the possibility encompassed within the *NPRM* -- that some or all broadband transmission capability deployed by the ILECs would not be subject to Title II, or available to competing broadband access providers – would not promote the provision of broadband services to all Americans. For the reasons stated in these comments, deregulation of ILEC broadband capability would merely enhance the ILECs' ability to stifle intramodal competition and afford them greater flexibility to delay introduction of network improvements that they would otherwise be compelled to make in response to competition.

Instead, in order to promote its broadband goals, the Commission should reaffirm that ILECs' broadband capability is, and will be, subject to Title II, all of the pro-competitive obligations of the 1996 Act, and *Computer Inquiry* unbundling obligations. The broadband competition that these regulatory requirements make possible will itself help meet the Commission's broadband goals and also is the best way to encourage ILECs to deploy an advanced broadband capability.

The Commission should determine that facilities-based wireline broadband Internet access service is composed of a telecommunications service (subject to Title II) and a separate information service. Wireline broadband Internet access is not a seamless information service

because the telecommunications component constitutes a transparent transmission path that is functionally separate from information services and is perceived as such by end users.

The fact that the Commission for the last 25 years has asserted Title II jurisdiction over the transmission component of ILEC networks that they use to provide information services by itself demonstrates that this transmission component is subject to Title II. Thus, under the *Computer Inquiry* requirements, which the *NPRM* correctly declares apply to ILECs, ILECs may use their own DSL services to offer high speed Internet access services, but, pursuant to Title II, are required to make DSL services available to other broadband access providers on a nondiscriminatory basis. Moreover, applicable case law defining common carriage as well as all of the policy and public interest considerations underpinning common carrier doctrine require that this capability be subject to Title II and unbundling obligations. Further, ILECs own and control the quintessential bottleneck facilities–the local loops–that compel common carrier status under the Act and common law. It is hard to imagine a more compelling public interest justification for application of Title II obligations to ILEC broadband capability.

The results of this regulation have proven its benefits: the ability of independent broadband access providers to obtain basic network functions on a nondiscriminatory basis has been the engine of the growth and success of the Internet and its attendant public interest benefits. Conversely, permitting ILECs to discriminate in favor of their own ISP operations to any significant extent would provide a perfect opportunity for ILECs to extend their monopoly control of the loop to the unregulated information services marketplace, a control the Commission has sought to avoid for over twenty-five years.

There are many other public interest benefits to preserving the Title II obligation that ILECs offer as a telecommunications service to competitors the broadband capability that they

use for their own Internet access service. First, the most critical benefit is that continuing to recognize this obligation would help preserve competitive carriers' eligibility under Section 251(c) for unbundled access to broadband network elements–without which intramodal competition would be effectively impossible.

Second, the Commission has no experience fashioning safeguards under Title I, and the scope of the Commission's authority under Title I is unformed and untested. Accordingly, the Commission should fashion a deregulatory framework for broadband by retaining Title II authority and deregulating as appropriate thereunder, rather than attempting to do so by sweeping all of broadband into Title I.

Third, elimination of Title II regulation of ILEC broadband capability is not necessary in order to permit ILECs to compete intermodally. ILECs are currently permitted to compete and provide broadband information services as customers of their own tariffed broadband telecommunications services. Under that framework, ILECs have succeeded spectacularly, experiencing explosive and sustained growth in DSL subscribership, especially given the nascent nature of the demand for such service.

The Commission should retain and strengthen *Computer III* safeguards against discrimination. The *Computer III* regulatory framework has been and continues to be essential for the growth and success of the Internet. The *NPRM* does not make a compelling case that marketplace conditions have changed sufficiently to permit elimination of *Computer III* safeguards–or indeed, that they have changed at all. *Computer III* was intended to, and did, create a framework that could accommodate the evolution of the network to a more advanced capability. Thus, the *Computer III* safeguards are not technology-specific. Instead, they are

broad anti-discrimination requirements that are, and should be, equally applicable in a narrowband or broadband environment.

The Commission should conclude this proceeding by reaffirming that the ILECs' broadband capability is fully subject to Title II and *Computer Inquiry* safeguards.

## III. REMOVAL OF EXISTING SAFEGUARDS WOULD SLOW, NOT PROMOTE, THE AVAILABILITY OF BROADBAND SERVICES

### A. Prodded By The Competition Fostered By the Existing Regulatory Scheme, ILECs Are Already Deploying Broadband Capability At A Speedy Pace Fully Commensurate With The Developing Market

ILECs have already widely deployed broadband capability, and are rapidly installing even more broadband capability in their existing networks. The ILECs' own statements show that they are increasing the deployment of a broadband capability notwithstanding Title II and other the regulatory obligations. For example:

- BellSouth announced 25% growth in data revenues and a 189% increase in DSL subscribers in 2001[4] Earlier this year, it reported: "BellSouth added 108,000 Broadband DSL customers in the first three months of 2002, and had 729,000 retail and wholesale DSL customers at March 31, an annual growth rate of 141 percent."[5]

- Qwest has reported that DSL customers at the end of 2001 represented a 74% increase from the end of 2000,[6] and that it had increased by 15% over year-end 2000 the number of its central offices equipped for DSL.[7] More recently, Qwest reported that total DSL (digital subscriber lines) revenues had increased approximately 77 percent year-over-year. Total DSL customers, including in-region and out-of-region DSL

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[4] "BellSouth Reports Fourth Quarter Earnings," http://www.bellsouth.com/investor/pdf/4q01p_news.pdf (Jan. 22, 2002). *See also* Newsroom, "BellSouth Captures 620,500 DSL Customers and Deploys Broadband Capabilities to More than 15.5 Million Lines," http://bellsouthcorp.com/proactive/newsroom/release (Jan. 3, 2002).

[5] "BellSouth Reports First Quarter Earnings," http://bellsouthcorp.com/proactive/newsroom/release.vtml?id=40063&PROACTIVE_ID=cecfcdcfcfcbc7cec6c5cecfcfcfc5cecfc7cccacdc6cecccbc5cf (April 19,2002).

[6] "Qwest Communications Reports Fourth Quarter, Year-End 2001 Results," http://media.corporate-ir.net/media_files/NYS/q/q_1_28_02earnrel.htm (Jan. 29, 2002).

[7] "Qwest Communications Reports Fourth Quarter, Year-End 2001 Results," http://media.corporate-ir.net/media_files/NYS/q/q_1_28_02earnrel.htm (Jan. 29, 2002).

customers, increased to 484,000 at the end of the first quarter 2002, a 58 percent increase from the same period of 2001.[8]

- In a January 24, 2002, "Investor Briefing," SBC stated that it had expanded its DSL-capable footprint by 37% in 2001 alone.[9] During the first quarter of 2002, SBC reports, it has added 183,000 DSL Internet subscribers, SBC's strongest quarterly growth in the past 12 months; at the end of that quarter, SBC had approximately 1.5 million DSL lines, up 59 percent from year-ago levels.[10]

- Verizon reported a 122% increase in DSL subscribers and a 21.2% increase in data transport revenues in 2001.[11] For the first quarter of 2002, it reported a total of 1.35 million digital subscriber lines (DSL) with approximately 150,000 net additions in the quarter, representing an 88 percent increase year-over-year.[12]

Obviously, these ILECs have deployed, and are continuing to deploy, broadband facilities under existing regulation – including *Computer Inquiry* safeguards as well as Section 251(c)(3) unbundling obligations.[13] Their "poor-mouth" complaints that they are being hindered from rolling out broadband are belied by their own actions, bringing to mind Chico Marx's immortal question: "Who are you going to believe, me or your own eyes?"

The ILECs have argued that they should be deploying broadband even faster, and that they would do so if existing regulation were lifted. But the pace of deployment is fully attributable to market factors and has not been impeded by common carrier regulation of

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8 "Qwest Communications Reports First Quarter 2002 Results," http://www.qwest.com/about/media/pressroom/1,1720,984_archive,00.html (April 30, 2002).

9 SBC Investor Briefing No. 228, http://www.sbc.com/investor_relations/financial_and_growth_profile /investor_briefings /1,5869,253,00.html, at 2 and 5 (Jan. 24, 2002) ("SBC Fourth Quarter Briefing").

10 "SBC First-Quarter Earnings of $0.51 Per Diluted Share at Top End of Target Range Provided by Company In January," http://www.sbc.com/press_room/1,5932,31,00.html?query=20020418-1 (April 18, 2002).

11 "Verizon Communications Reports Solid Results For Fourth Quarter, Provides Outlook for 2002," http://investor.verizon.com/news/VZ/2002-01-31_X263602.html (Jan. 31, 2002).

12 "Verizon Reports Solid First-Quarter Adjusted EPS Of 72 Cents in Challenging Economic Environment -- 2002 Outlook Updated," http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=74354 (April 23, 2002).

13 *Deployment of Wireline Service Offering Advanced Telecommunication Capability,* 13 FCC Rcd 24011 (1998).

broadband services. First, there are no "killer applications" for which wireline broadband networks more advanced than those already in place are necessary. Video programming is oft-cited as such, yet it is already available from a multitude of sources, including over-the-air broadcast, cable, satellite, videocassettes and DVDs. The ILECs have painted a glowing picture of someday building a super-broadband "passive optical network," bringing fiber optics as close to consumers as possible.[14] If such futuristic super-high-speed networks have not been built, however, it is because there is insufficient demand for them, not because of regulatory obstacles.

Moreover, the technical solutions that might make such networks affordable have not yet been invented. Recent studies show that most consumers are unwilling to pay more than $25.00/month for high speed access and that this explains why less than 5% of U.S. households subscribe to it.[15] Given that the ILECs' own studies estimate that the cost of deploying such gold-plated networks nationwide would be $270 billion to $416 billion,[16] it is clear that this type of network is not currently economically feasible.

Accordingly, even if the Commission were to comprehensively deregulate ILECs' participation in the broadband marketplace, there is no reason to believe that this action would result in widespread deployment of "super" broadband networks. Regulation or no regulation, ILECs will not build these futuristic networks unless costs drop dramatically or they are

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[14] Communications Daily, February 26, 2002, at 4-5, describing *Building a Nationwide Broadband Network: Speeding Job Growth*, Telenomic Research, February 25, 2002.

[15] "Broadband Success Requires More than Regulatory Clearance, Says Research," CLEC News, February 21, 2002, http://www.isp-planet.com/cplanet/news/02feb2002/18broadband.html

[16] Communications Daily, February 26, 2002, at 4-5, describing Building a Nationwide Broadband Network: Speeding Job Growth, Telenomic Research, February 25, 2002.

permitted to compel all ratepayers to pay for them through cross-subsidies and general rate increases.[17]

### B. ILEC Incentives Not to Deploy Broadband, To the Extent They Exist, Would Not Be Decreased By Deregulation

Only ILECs possess ubiquitous networks that can be used to provide services to consumers and businesses. But they are not the best source of innovation in the provision of services over those networks. In fact, ILECs are slow to roll out new services and have strong incentives not to deploy new, more efficient services that will compete with, and cannibalize, existing services. It has been CLECs, not ILECs, who have worked cooperatively with their customers to serve their needs, and who have been key drivers in the development and deployment of new advanced services. As explained above, services provided by entities such as DSL.net have gone well beyond the use of broadband transmission to access the Internet, and include such services as access to corporate LANs and live, continual data backup and recovery.

The ILECs' pattern of deployment of DSL-capable networks vividly illustrates that ILECs are not sources of innovation and prefer to maintain revenues from existing services. Despite the long-time availability of DSL technology, the ILECs let DSL lie fallow until CLECs began to deploy it. As one observer put it, the ILECs "kept cheaper DSL on the shelf for a decade" to protect their higher revenue services.[18] That decision may have been economically rational from the ILECs' point of view, but consumers and

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[17] *See generally Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, CC Docket No. 98-146, FCC 02-33, at para. 62 (rel. Feb. 6, 2002) ("*Third Section 706 Report*") (footnotes omitted).

[18] James Glassman, "Best Remedy for Recession? Break Up the Bells," http://www.techcentralstation.com/NewsDesk.asp?FormMode=MainTerminalArticles&ID=131 (December 10, 2001).

businesses were short-changed by being required to bear the higher costs and poorer quality of the ILECs' earlier "high speed" services for years longer than necessary.

While competition to the ILECs' broadband services continues to emerge despite setbacks and the ILECs' best efforts, the market is far from sufficiently competitive to warrant any deregulation. Some ILECs have responded to recent market conditions by substantially *raising* prices for DSL service, which never would have happened in a competitive market. For example, in October 2001, SBC raised its wholesale prices for DSL services by approximately 15% (while admitting that its cost to provide DSL was declining).[19] And in May 2001, Verizon hiked its DSL rates a full 25%.[20] These actions bear out the recent statement of a group of distinguished economists in a letter to Commerce Secretary Donald Evans: "both history and economic theory have taught us [that] deregulating a monopoly without genuine prospects for competition does not induce it to deploy more infrastructure, only to exploit more severely the infrastructure that it has already in place by limiting its use and raising its price."[21] The Commission should maintain this lesson firmly in mind and resist the ILECs' illusory enticements.

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[19] SBC Investor Briefing, "Second-Quarter Diluted Earnings Per Share Increases by 8.9% with Focus on Disciplined Financial Management," Growth Drivers (July 25, 2001) at 5 ("SBC continues to improve the economics of DSL. Acquisition costs have declined by more than 25 percent since the fourth quarter of 2000 due to modem cost reductions and operational improvements." http://www.sbc.com/Investor/Financial/Earning_Info/docs/2Q_IB_FINAL_Color.pdf (viewed March 1, 2002)).

[20] Comments of SBC Communications, Inc. CC Docket No. 01-337, filed March 1, 2002, Attachment A, Declaration of Robert W. Crandall and J. Gregory Sidak at para. 38.

[21] Letter from William J. Baumol et al. to Honorable Donald L. Evans et al., dated December 11, 2001, at 3.

## IV. THE TRANSMISSION COMPONENT OF THE ILECS' WIRELINE BROADBAND INTERNET ACCESS SERVICE IS A SEPARATE TELECOMMUNICATIONS SERVICE, NOT AN INFORMATION SERVICE

### A. The "Bundle" Described By the *NPRM* Is Not A Unitary Service, But Consists of A Transparent Transmission Service Used to Access A Separate Information Service

So-called "wireline broadband Internet access" is in reality not a single offering, as the *NPRM* suggests, but an offering of information services bundled together with the separate and distinct transparent telecommunications service used to access them. The bundling does not change the fact that the two pieces are conceptually and legally separate, because the same transmission path might equally well be used to provide voice or other data services.

It is important to be clear that DSL is completely separate as a technical matter from the Internet. DSL is a "layer 1" computer networking protocol (*i.e,* one that defines the physical interface between devices) and is used as a means of obtaining information from some source – *e.g.,* a computer on a private corporate network or a Web server. Whatever the source of the information, inasmuch as DSL is a layer 1 technology, the use of DSL in no way affects or changes the content or nature of the information flowing over the loop to the customer. While the users in many applications have the capability to change the appearance and format of content they receive or send from the data source, these capabilities are not provided by the wireline provider but by software in the end user's computer and/or by the data source to which the end user chooses to connect. For all intents and purposes, the *only* difference between obtaining information via DSL technology and via voice technology is the frequency range and the other

layer 1-related aspects of the different protocols that are used to transmit the electronic signals over the last-mile copper local loop.[22]

Nor does the fact that the user is using the transmission path to connect to a content provider render the transmission service an information service, even if the content provider is affiliated with the wireline service provider of the transmission path. The same path and TCP/IP protocol could also be used to transmit voice or data of the user's choosing. This is not a new concept: the traditional telephone network has always provided users the ability to retrieve information. Users are able to use the voice network to connect to numerous sources of stored information such as banking information, stock quotes, news, sports scores, entertainment information, horoscope, weather, and time of day—many of which are highly interactive.[23] This use of the voice network by the end user is conceptually identical to use of Internet access to retrieved information on the Web, yet no one has suggested that these uses change the character of the traditional voice network.

DSL has a number of features that make it a desirable technology for transmitting information in digital format: (i) it works over the existing copper local loop infrastructure;. (ii) it permits faster and more varied transmission speeds than voiceband; (iii) it is less expensive than other high speed services such as ISDN and T1; and (iv) it can typically be provisioned more

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[22] To be sure, the use of higher frequencies requires the use of different equipment for DSL from that used with voice-band, at the customer premise and the central office, but that equipment preserves the transparent nature of transmission. It does not alter the customer-transmitted information any more or less than does the traditional equipment that transmits information at voice-band frequencies.

[23] For example, the Washington Post operates a service called Post-Haste, reachable by dialing 202-334-9000, over which a caller, by following prompts and/or entering codes, can pick and choose among a wide variety of information, including news reports, headlines, local and national weather reports, sports scores, stock prices, lottery results, sound clips associated with record reviews, best-selling book lists, mortgage rates, ski reports and similar information. *See, e.g.,* http://washpost.com/gen_info/posthaste/ or 202-334-9000#1000. Of course, the voice network can be used to transmit and receive data by the use of dial-up modems as well.

quickly than other services, in part because the customer premise equipment can often be installed by the end users.

For these reasons, DSL is flexible enough to meet the high-speed access requirements of most small/medium businesses such as DSL.net's customers, as well as enterprise teleworkers, and end users of ISPs. Small/medium businesses in particular can use DSL to access the Internet for document sharing, online research, online procurement, email, and other collaborative online business applications, without the costs of a high-capacity leased line, but with the speed they need for their purposes.

The Connecticut DPUC, for one, has agreed with the position that DSL transport is telecommunications, and is separate from Internet access. In response to a DSL.net petition, it required SBC to file tariffs for DSL transport separated from its internet offering and required SBC to provide a wholesale discount of 25.4% for the DSL transport.[24]

The Commission has recognized that merely combining an enhanced service with an information service offering for a single price does not always yield a single enhanced service offering. In determining whether the offering is a single information service or a bundled offering of information service and telecommunications service for one price, the "issue is whether, functionally, the consumer is receiving two separate and distinct services."[25] As shown above, the ILECs' "wireline broadband Internet access" is a bundled offering of two *distinct* services – a telecommunications service and an information service. Therefore, the

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[24] *Petition Of DSL.net Communications, LLC Regarding Obligations Of The Southern New England Telephone Company*, Decision, Docket No. 01-01-17, March 28, 2002.

[25] *Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge, Fourth Order on Reconsideration,* CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, , FCC 97-420, 13 FCC Rcd 5318 at para. 282 (1997).

Commission's traditional test mandates that the telecommunications service should be regulated as such.

### B. Technological Convergence Requires Treating The Transmission Component As A Telecommunications Service

Most industry observers predict that the circuit switched network will soon be replaced by a network providing all services – including voice – as applications traveling over digital packet-switched facilities using IP protocol.[26] Because everything is made up of packets, there will be no meaningful distinction between the network and the Internet: the Internet will *be* the network. For this reason, the classification of all facilities-based uses of Internet access service as one seamless information service, as the ILECs propose, would lead to the deregulation of core services as voice by mere operation of technological advance, with no input from this Commission. To forestall this outcome, the Commission must continue to recognize that provision of a pure transmission path is a telecommunications service. This will provide a consistent approach for establishing a rational deregulatory framework for provision of telecommunications services as and when circumstances warrant..

### C. The Commission Should Maintain Existing Regulation To Prevent ILECs From Extending Their Dominance Into The Broadband Market

In its past applications of the statutory distinction between telecommunications and information services (and before that, of the distinction between enhanced and basic services) the Commission resolved ambiguities with the intent of best furthering its core policy goals. Most pertinently here, the Commission established its definitions of basic and enhanced services in order to assure that (i) information services providers would not be unnecessarily regulated as

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[26] *See The Local Exchange Network in 2015*, Lawrence K. Vanston, Ph.D., Technology Futures, Inc. (2001).

common carriers while at the same time assuring that (ii) ILECs would not be able to leverage control of the local network into control of the information services market as well.

In the instant context, removal of existing unbundling requirements and other safeguards against discrimination would permit ILECs to further extend their overwhelming share of the wireline broadband Internet access beyond the 93% of customers they already control.[27] Removal or weakening of these safeguards would gut the regulatory structure that to date has overseen the growth and success of the Internet, and the expansion to small and medium sized businesses of capabilities that were previously the exclusive province of the largest businesses. For these reasons, too, DSL.net urges the Commission to determine promptly that it will continue to define ILECs' broadband services common carriage subject to existing--or even strengthened--Title II safeguards.

## V. THE FACT THAT CLECS WILL USE THE DISTINCT TRANSMISSION COMPONENT TO PROVIDE TELECOMMUNICATIONS SERVICE SUPPORTS THE CONTINUED APPLICATION OF SECTION 251(c)(3) UNBUNDLING OBLIGATIONS

Even if the Commission classifies wireline broadband service as an information service when bundled with Internet access, it should continue to require local exchange carriers to offer the transmission component of such services separately as telecommunications services. As previously discussed in these comments, this transmission component has all of the indicia of a telecommunications service. A critical reason for this classification of these transmission services is the need to preserve Section 251(c)(3) unbundling requirements, without which emerging competitors such as DSL.net will be unable to provide their services to their

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[27] *FCC Releases Report on the Availability of High Speed and Advanced Telecommunications Capability*, FCC Press Release (Feb. 6, 2002).

customers.[28] Classifying such services as telecommunications services will help assure that competing providers have unbundled access to the network elements necessary to provide competing services, as contemplated by the 1996 Act. [29]

Section 251(c)(3) requires ILECs to provide telecommunications carriers with non-discriminatory access to unbundled network elements "*for the provision of a telecommunications service.*"[30] Section 153(29) defines a "network element" as "a facility or equipment *used in the provision of telecommunications services.*"[31] If the Commission allows the ILECs to wall off the transmission component from classification as a "telecommunications service," by the mere expedient of bundling it with an information service, the ILECs will have every incentive to designate as many facilities as they can as facilities used for these broadband services. This, in turn, would cut off CLEC access to these bottleneck facilities, which would otherwise be subject to unbundling under Section 251(c)(3).

In the *NPRM*, the FCC appears to suggest that unbundled access to network elements under Section 251(c)(3) may not be required if the network elements are used by the ILECs to provide only information services.[32] The Commission has previously – and correctly –

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28 47 U.S.C. § 251(c)(3).

29 Section 251(d)(2) sets forth a "necessary" and "impair" test that applies to proprietary and non-proprietary network elements, respectively, to determine whether an element must be made available to competing carriers. 47 U.S.C. § 251(d)(2). Based on these tests, the Commission has identified several key network elements that must be made available to competing carriers, including loops. The loop UNE includes high-capacity lines, dark fiber, line conditioning, and some inside wire. Loops, as well as other UNEs, are key network components used to provide the transmission path that is necessary for competing telecommunications carriers to offer their services. *In Re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Notice of Proposed Rulemaking*, CC Docket No. 01-339, FCC 01-361, released December 20, 2001 ("*Triennial UNE Review*") (*citing Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696, 3721 (1999) ("*UNE Remand Order*")).

30 47 C.F.R. § 251(c)(3) (emphasis added).

31 47 U.S.C. § 153(29) (emphasis added).

32 *NPRM* at para.61.

recognized that the Section 251(c)(3) unbundling requirements are triggered by the *CLEC's* intended use of such network elements to provide telecommunications services.[33] Similarly, the Commission has determined that a CLEC may obtain unbundled access to a network element even if the CLEC will use it to provide an information service or data or TTY service in addition to a telecommunications service.[34] Thus, even if the ILECs' bundled wireline broadband Internet access were to be reclassified as an information service, this reclassification (although erroneous) would not affect CLECs' ability under the law to obtain joint-use network elements. The Commission should not and indeed cannot change course here.

## VI. THE TRANSMISSION COMPONENT OF FACILITIES-BASED WIRELINE BROADBAND INTERNET ACCESS SERVICE IS COMMON CARRIAGE SUBJECT TO TITLE II

### A. Under Clear Commission and Court Precedent, The Telecommunications Component is Common Carriage, And Therefore Subject to Title II Regulation

The transmission component of wireline broadband Internet access clearly satisfies the traditional test for common carriage under the Act, as consistently interpreted by the Commission and the courts. This fact alone requires that the transmission component remain subject to common carrier regulation under Title II.

The Act defines a common carrier as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio . . . ."[35] The Commission's regulations define common carrier as "a person engaged in rendering communications service for hire to the

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33 *See Deployment of Wireline Service Offering Advanced Telecommunication Capability* 13 FCC Rcd at 24012 (1998).

34 Local Competition Order, [whole cite]@@

35 47 U.S.C. § 153(10).

public."[36] The U.S. Court of Appeals for the D.C. Circuit in *NARUC I* and *II*[37] found these rules less than fully illuminative and established a test for determining whether an activity constitutes communications common carriage. The D.C. Circuit deemed that the "critical point" is the "quasi-public character of the activity involved," *i.e.*, "that the carrier undertakes to carry for all people indifferently."[38] The key is not how large a clientele the carrier serves, but the "holding oneself out to serve the public indiscriminately."[39] This quasi-public character will either arise out of a legal compulsion to serve the public indifferently or reasons implicit in the nature of the operations to expect an indifferent holding out to the eligible user public.[40]

The Court in *NARUC II* added a second prong to the test for common carriage, *i.e.* that customers "transmit intelligence of their own design or choosing."[41] The key consideration is whether the content of the transmission may be under the customer's control. This "control" can be as simple as the decision whether to transmit information or not.[42] Post-*NARUC I* and *II,* the Supreme Court adopted a definition of communications common carrier that incorporated the D.C. Circuit's NARUC I and II approach."[43]

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36 47 C.F.R. § 51.5.

37 *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*"); *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 533 F.2d 601 (D.C. Cir. 1976) ("*NARUC II*").

38 *NARUC I* at 641.

39 *Id.* at 642.

40 *Id.* Common carrier service is contrasted with private carriage which is "set aside for the use of particular customers, so as to not be generally available to the public." *Id.* Private carriage is characterized by a "clientele that might remain relatively stable, with terminations and new clients, the exception rather than the rule," and the carrier would expect to negotiate with and select future clients on an individualized basis. *Id.* at 643.

41 *NARUC II* at 609.

42 *Id.* at 610.

43 *See FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979).

Applying these principles to the transmission component of facilities-based wireline broadband Internet access service leads to the inescapable conclusion that such a service is a common carrier offering subject to Title II.[44] The offering of the underlying transmission service meets the test for common carriage, because ILECs are offering to provide the telecommunications portion of the service indiscriminately. The ILECs do not deal on an individual basis with millions of consumers. Instead, they undertake to provide service to all on the same terms and conditions; indeed, this is the only way ILECs could practicably provide widespread services. Therefore, the transmission component of facilities-based wireline broadband Internet access is a common carrier offering under *NARUC I*.[45]

### B. The ILECs' Dominance in the Wireline Broadband Marketplace Requires Application of Title II

The dominant carrier status of the ILECs fully justifies assertion of Title II jurisdiction over the ILECs' wireline broadband Internet access services. As has been established in the *Non-Dom Proceeding*,[46] ILECs are dominant in the provision of broadband services. This dominance is attributable in part to the fact that only ILECs possess the ubiquitous loops and transport facilities necessary to reach consumers and businesses. DSL.net and other CLECs must have unbundled access to these facilities to provide their services to their customers. Moreover, the ILECs' demonstrated ability to provide a broadband capability stems in large part from their ability to "piggy-back" the construction of broadband facilities upon their dominant

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[44] In addition, the "legal compulsion to serve" part of the NARUC I test is met by the current regulatory requirement that ILECs may use their own transmission services to provide information services *only* as customers of their own tariffed offering of the transmission service, and must unbundle the transmission component.

[45] It is important to note that the D.C. Circuit in NARUC I limited the scope of the Commission's discretion whether to apply or not apply common carrier status. *NARUC I* at 644. Thus, the Commission may not, for example, refrain from applying Title II based on the misguided view that this would promote deployment of broadband.

[46] *In Re Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services,* CC Docket No. 01-337, FCC 01-360 (rel. Dec. 20, 2001) ("*Non-Dom Proceeding*").

core voice telephone network. This gives the ILECs a significant economic advantage of integration that is unavailable to competing, non-integrated providers.[47]

If ILECs are freed from their interconnection and unbundling obligations with regard to facilities used to provide information services, and are freed from their common carrier obligations to provide service on demand, at tariffed rates that are just and reasonable, without unreasonable discrimination, then the ILECs will be able to achieve their objective of driving from the market competitors that rely in part on ILEC facilities. To prevent this result, the continuation of the exercise of Title II authority over the transmission capability of facilities-based broadband wireline Internet access is absolutely essential.

## VII. TITLE II PERMITS DEREGULATION WHERE APPROPRIATE WHEREAS TITLE I WOULD NOT ALLOW THE COMMISSION TO MAINTAIN NECESSARY SAFEGUARDS

### A. The Commission May Not Have Adequate Authority Under Title I To Establish Adequate Safeguards for ILEC Participation in the Broadband Information Services Market

The Commission seeks comment on the possibility of applying a "minimal regulatory Title I regime" to wireline broadband Internet access services and on the implications for nondiscriminatory access objectives.[48] For the reasons stated in these comments the Commission should retain Title II jurisdiction over the transmission component of wireline broadband Internet access service. If the Commission should nevertheless pursue Title I

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[47] The Commission in its proceeding addressing the proper regulatory treatment of ILEC broadband services has recognized that ILECs continue to have market power with respect to basic local exchange service and that broadband services are provided over the same local exchange and exchange access facilities. *Non-Dom Proceeding,* Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC 01-360, para. 6. As Chairman Powell notes in his separate statement therein (at page 1) the ILECs remain "clearly dominant" in local exchange service.

[48] *NPRM* at paras. 16, 50.

regulation, adequate safeguards would be essential, but it is highly questionable whether the Commission would have sufficient authority under Title I to fashion such adequate safeguards.[49]

In clarifying the scope of the Commission's authority under Title I, the courts have held:

> *Title I is not an independent source of regulatory authority*; rather, it confers on the FCC only such power as is *ancillary* to the Commission's specific statutory responsibilities. . . . In the case of enhanced services, the specific responsibility to which the Commission's Title I authority is ancillary to its Title II authority is over common carrier services.[50]

Similarly, the Commission has recognized the limitations of its Title I jurisdiction in regard to ILEC validation and screening services for calling cards, noting that "regulation of these services under Title I ancillary jurisdiction, as suggested by some of the ILECs, might not be adequate to ensure provision of these services on a non-discriminatory basis, under just, reasonable and non-discriminatory terms and conditions."[51] Accordingly, the Commission recognized that Title II regulation of those services was warranted.[52]

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[49] The Commission also seeks comment on possible regulation of facilities-based wireline broadband Internet access as "private carriage." This is legally untenable: wireline broadband Internet access clearly does not in fact constitute private carriage. As noted above, ILECs offer service to end users and to the thousands of ISPs in their regions on a public offering basis, and this is the only practical way for them to do so. ILECs do not determine with each customer on an individual basis on what terms to provide service, nor would they even if completely deregulated. Therefore, the Commission must reject the private carriage approach to regulation of broadband wireline Internet access.

[50] *California v. FCC*, 905 F.2d 1217, 1240 (9th Cir. 1990) ("*California I*") (emphasis added; citations omitted).

[51] *Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, CC Docket No. 91-115, Report and Order and Request for Supplemental Comment, FCC 92-168, para. 25 (1992).

[52] *Id.*

Obviously, ancillary authority under Title I does not provide the same degree of authority as direct authority under Title II. For the Commission to exercise Title I jurisdiction over Internet access, such exercise would need to be justified as ancillary to the Commission's Title II jurisdiction over common carrier services. If the Commission finds *no* common carrier component to the Internet access service, however, the Commission may lose its ability to exercise jurisdiction under Title I, inasmuch as there would be nothing for such jurisdiction to be "ancillary" to. Indeed, it is not clear to what extent the Commission could exercise *any* affirmative authority over wireline broadband Internet access under Title I if it forswears its Title II authority.

History provides little comfort in this regard. The Commission has not heretofore established a comprehensive scheme of regulation under Title I. In fact, the Commission's affirmative exercise of Title I jurisdiction has mainly been limited to preempting state regulation.[53] It is not easy to see, then, how the Commission could use Title I to create safeguards adequate to restrain ILEC anticompetitive behavior. For example, the Commission asks how access to ILEC transmission services for Internet access should be priced if it requires that ILECs to provide such access.[54] But there is nothing in the Commission's existing Title I precedent that would clearly support a mechanism for developing, or a power to enforce, such pricing standards.

Because of the uncertain scope of its Title I authority, the Commission should retain Title II regulation over the transmission component of wireline broadband Internet access and non-

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[53] For instance, when the Commission detariffed ILEC provisioning of inside wiring, it used its Title I jurisdiction to preempt states from tariffing the service. *Promotion of Competitive Networks In Local Telecommunications Markets*, WT Docket No. 99-217, CC Docket No. 96-98, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, ¶ 56 (1999).

Internet data transmission in order to be assured that it will have adequate authority to maintain necessary safeguards against discrimination.

### B. The Commission May Deregulate Under Title II, Should Future Market Conditions Permit

While Title II provides adequate authority for safeguards, it also permits deregulation where justified by the condition of the marketplace. Title II sets forth a broad palette of powers and authority for the Commission, but the Commission is not required to apply the full scope of its authority under Title II. Section 160 of the Act gives the Commission flexibility in this regard by expressly allowing it to forbear from applying provisions of the Communications Act (save for interconnection and Section 271 provisions) if certain conditions are met.[55] Therefore, the Commission has ample flexibility under Title II to respond to marketplace conditions. There is no need to apply Title I regulation in order to do so.

## VIII. TITLE II REGULATION OF THE TRANSMISSION COMPONENT OF WIRELINE BROADBAND INTERNET ACCESS HAS BEEN AND STILL IS IN THE PUBLIC INTEREST

### A. Contrary to the Suggestion in the *NPRM*, *Computer Inquiry* Safeguards Are Not Obsolete In a Broadband Environment

In the *NPRM*, the Commission seeks comment on whether the *Computer Inquiry* requirements should be modified or eliminated for facilities-based wireline broadband internet access services.[56] The Commission suggests that these requirements may not be appropriate to apply to broadband access services because the restrictions imposed in the *Computer Inquiry* proceedings were initiated "at a time when very different legal, technological and market

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54 *NPRM* at ¶ 50.

55 47 U.S.C. § 160.

56 *NPRM* at para. 43.

circumstances presented themselves to the Commission" and addressed services "more akin to voice mail and other narrowband applications," rather than broadband services.[57]

Contrary to the Commission's suggestion, however, the safeguards established in the *Computer Inquiry* proceedings were explicitly designed to accommodate new and emerging technologies, not to be limited to the circumstances existing at that time.[58] In any event, the legal, technological and market factors underlying the fundamental principles of the *Computer Inquiry* proceedings, upon which the safeguards are based, are equally valid today in the broadband services market. While some companies have fallen by the wayside, as is inevitable with a new technology, and while the ILECs have been able to exploit ambiguities and uncertainties in regulation to their gain, existing providers such as DSL.net have weathered the storm and offer competitive choices to a growing number of consumers. Deregulation of the ILECs as the *NPRM* proposes would only disrupt the market and reverse this trend toward greater competition. Thus, at a minimum, the existing *Computer Inquiry* safeguards must remain in place for broadband access services.

The Commission's initiation of the *Computer Inquiry* proceedings arose from the realization that the traditional telephone network was no longer limited to providing "plain old telephone services" and that technological evolution allowed the provision of computer and data

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57 *Id.* at paras. 31, 35.

58 *See In Re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, Final Decision and Order,* 28 F.C.C.2d, 268-69 (1971) *("Computer I")* (finding that data processing will be a major force in the economy "in both absolute and relative terms in the years ahead"); *see also See Amendment of Section 64.702 of the Commission's Rules and Regulations, Final Decision,* 77 F.C.C.2d 384, 425 (1980) (*"Computer II"*) (refusing to classify different categories of enhanced services because in "a market as vibrant as enhanced services" such a distinction "may miss important new developments").

processing (enhanced) services over these networks.[59] The Commission's *Computer Inquiry* proceedings focused on the degree of regulation that should apply to enhanced services and the basic services used to transmit them. The result was the creation of a basic/enhanced services dichotomy, in which the Commission separated the basic common carrier transmission services from the rapidly evolving enhanced services[60] and found separate regulatory schemes for these services necessary to address the functional and competitive differences between them.[61]

In the *Computer II* proceeding, the Commission made it clear that its basic service classification was not meant to restrict "a carrier's ability to take advantage of advances in technology in designing its telecommunications network."[62] The Commission recognized that basic service can be offered utilizing different bandwidths, as well as different analog and digital capabilities.[63] The Commission also stated that "[u]se internal to the carrier's facility of communications techniques, bandwidth compression techniques, circuit switching, message or packet switching, error control techniques, etc. *that facilitate economical, reliable movement of information does not alter the nature of the basic services.*"[64] Thus, the Commission's establishment of the basic services classification and associated regulation expressly took into account the future technological potential of such services, and expressly recognized the difference between a transparent transmission path and the provision of nontransparent enhanced

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59 *See In Re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, 7 F.C.C.2d 11 (1966) ("*Computer I NOI*").

60 *Computer II,* 77 F.C.C.2d at 387, 419-20; *see also* 47 C.F.R. § 64.702(a). Following the passage of the 1996 Act, the Commission found that Congress intended to maintain the basic/enhanced distinction in its definitions of "telecommunications services" and "information services" and that "enhanced services" and "information services" were synonymous. *See Federal State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd 111501, 11516-17, 11520, 11524 (1998).

61 *Computer II,* 77 F.C.C.2d at 384.

62 *Id.* at 420.

63 *Id.* at 419.

or information services. Among other things, its recognition of the rise of "distributed processing" directly foreshadowed the Internet.

For this very reason, the key *Computer Inquiry* safeguards, such as the unbundled offering of basic service, are *not* technology-specific. They can, and do currently, apply equally to narrowband and broadband services. Throughout the history of the *Computer Inquiry* proceedings, the primary purpose of the basic/enhanced dichotomy and the safeguards established therein has been to address the reliance of the enhanced services on bottleneck basic transmission services.[65] The Commission consistently has determined that dominant facilities-based carriers providing both basic and enhanced services have an incentive to discriminate against competing service providers that seek to purchase the underlying transmission capacity from the dominant carriers.[66] Thus, the Commission retained Title II common carrier regulation of the basic transmission services used to provide these services.[67] Nothing about broadband reduces the validity of these fundamental principles to which the Commission has thus far faithfully – and very productively – adhered.

Changes in technology may have improved transmission speeds and allowed the transfer and use of more sophisticated data and broadband services, but broadband providers still rely on bottleneck basic transmission services interconnected with the telecommunications network to

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64 *Id.* at 420. (emphasis added)

65 *Computer I*, 28 F.C.C. at 269; *see also Computer II*, 77 F.C.C.2d 384; and *Amendment of Section 64.702 of the Commission's Rules and Regulations, Report and Order*, 104 F.C.C.2d 958 (1986) ("*Computer III Phase I Order*").

66 *See In Re Policy and Rules Concerning the Interstate, Interexchange Marketplace, Report and Order*, 16 FCC Rcd 7418, 7420 (2001) ("*CPE/Enhanced Services Unbundling Order*").

67 *Id.* at 428.

provide these broadband services. And so the Commission has continued to apply the *Computer Inquiry* safeguards to new technologies, including high-speed, packet-switching services.[68]

The *NPRM* cites the pro-competitive and deregulatory policies of the 1996 Act that are aimed at the development of the Internet and deployment of advanced services, suggesting that these statutory mandates may lead to results different from those considered in the *Computer Inquiry* proceedings.[69] Contrary to the Commission's suggestion, however, the statutory mandate underlying the *Computer Inquiry* policies is fully consistent with the statutory mandate governing broadband access services. As the basis for its *Computer Inquiry* rules, the Commission cites to its mandate pursuant to Section 151 of the Act "to make available 'to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges . . . .'"[70] In its *NPRM* in this proceeding, the Commission quotes the statutory mandate of Section 706 of the 1996 Act to encourage "the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . ." as the basis for its regulation of broadband access services.[71] As is evident in the language of both of these provisions, the Commission's goals under both statutory provisions are parallel—to establish rules and policies that will make communications and advanced telecommunications available to all Americans.

In sum, there is nothing about wireline broadband Internet access services that justifies exempting these services from the fundamental principles governing common carrier regulation and the protections against discrimination and anticompetitive behavior that lie at the heart of the

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68 *See Frame Relay Order*, 10 FCC Rcd 13,717.

69 *NPRM* at para. 35, n. 69.

70 *Computer I*, 28 F.C.C.2d at 268 (citing 47 U.S.C. § 151).

71 *NPRM* at para. 35, n.69 (citing 47 U.S.C. § 157).

*Computer Inquiry* and Section 251 safeguards. Rather, as demonstrated herein, these principles are critical to promoting competition in the broadband access market.

### B. State Authority Could be Adversely Impacted By the Proposed Reclassification

In the *NPRM*, the Commission seeks comment on how classification of wireline broadband Internet access services as information services would impact the balance of federal and state responsibilities over the network, particularly in light of the fact that the Commission has found that xDSL transmission used to provide Internet access services are subject to Commission jurisdiction.[72]

Under the Act, the states exercise authority over intrastate telecommunications service which they regulate as common carriage. The Act provides that "nothing in this Act shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices services, facilities, or regulations for or in connection with intrastate communication service . . . ."[73] A pronouncement by the Commission that ILEC broadband capability is, in fact, not subject to common carrier regulation because it is used exclusively to provide an information service could have a profound impact on the ability of states to regulate broadband services.

States play an important role in the regulation of wireline broadband Internet access and protecting consumer interests. Several states, including Connecticut (as mentioned previously herein), California[74] and Illinois, have been active in assuring nondiscriminatory access to ILEC broadband capability. For example, the Illinois Commerce Commission ("ICC") has ensured

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72 *See NPRM*, at para. 62.

73 47 U.S.C. § 152(2)(b).

competition in the provision of broadband Internet access facilities. In October 1999, SBC announced its $6 billion Project Pronto initiative to extend new fiber-fed loop facilities to millions of end-users. In February 2001, the ICC became the first state commission to order the unbundling of the fiber-fed loop architecture. The Illinois decision established four new UNEs.[75] In the course of the ICC's deliberations, Ed Whitacre, Chairman and CEO of SBC, wrote in a letter to Speaker of the House Hastert and other legislators that the Illinois decision would make it "economically impossible" for SBC to deploy Project Pronto in the state. The letter warned that, because of SBC's decision to halt Project Pronto in Illinois, the affected consumers "cannot now, and may never, have access to DSL."[76] In response, ICC Commissioner Harvill noted that the very fact that a halt of Project Pronto would assertedly deprive some consumers of ever having access to DSL demonstrated precisely that SBC's dominance of the market continued and therefore that it remained important for the ICC to enforce aggressively SBC's unbundling obligations.[77]

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[74] *See California ISP Ass'n v. Pacific Bell Tel. Co. and SBC Advanced Solutions, Inc.*, Case 01-07-027, California Public Utilities Commission (filed July 26, 2001) ("*CISPA Complaint*").

[75] The ICC established four separate UNEs: (1) the subloop from the customer to the line card; (2) the line card itself; (3) the subloop from the line card to the OCD, and; (4) a port on the OCD. The decision also guarantees the right of CLECs to collocate their own line cards in SWBT's channel bank at the remote terminal. *See Arbitration Decision on Rehearing, In the Matter of Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company d/b/a/ Ameritech Illinois, and for an Expedited Arbitration Award on Certain Core Issues, et al., Illinois Commerce Commission,* Docket Nos. 00-0312 and 00-0313, Illinois Commerce Commission (Feb. 15, 2001) and Order (Mar. 14, 2001).

[76] Letter from Ed Whitacre, Chairman and Chief Executive Officer, SBC Communications, Inc., to the Honorable J. Dennis Hastert, U.S. House of Representatives 1(Mar. 14, 2001), http://www.icc.state.il.us/icc/tc/cond29.asp

[77] *The Internet Freedom And Broadband Deployment Act Of 2001: Hearing Before The House Committee On Energy And Commerce*, 107th Cong., 1st Sess., on H.R. 1542, April 12, 2001, Serial No. 107–24 at 42

In order to displace state regulation, congressional intent must be "clear and manifest."[78] Similarly, federal preemption of state regulation "must be clear and occurs only in limited circumstances."[79] Under Section 2(b) of the Act, Congress left the states with substantial authority so long as state regulation does not conflict with the Commission's authority over interstate communications. Therefore, the Commission should define wireline broadband Internet access service as a telecommunications service to preserve state authority over ILEC intrastate broadband services.

### C. Sections 201 and 202 Must Continue To Be Applied To Ensure That Access To Underlying Transmission Capacity Is Provided Under Just And Reasonable Rates And On A Non-Discriminatory Basis

If the transmission component of wireline broadband Internet access is not regulated as a telecommunications service under Title II of the Act, competitive providers of broadband access services will lose the critical protections of Sections 201 and 202. As the Commission notes in its *NPRM*, CLECs, ISPs and others purchase from ILEC tariffs or interconnection agreements high speed transmission services for their broadband services.[80] The terms and conditions of these services are governed by the mandates of Sections 201 and 202 of the Act that rates and terms be just and reasonable, and that carriers not engage in unjust and unreasonable discrimination. If the ILECs' provision of transport services necessary to provide broadband access services were no longer subject to these Title II requirements, then dominant carriers that provide competing broadband access services, while also controlling the underlying transmission capacity, would be free to discriminate against their broadband access competitors.

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78 *See Jones v. Rath Packing*, 430 U.S. 519, 525 (1977).

79 *See Communications Systems Intnt'l v. the Cal. Pub. Utils. Comm'n*, 196 F.3d 1011, 1017 (9th Cir. 1999).

80 *NPRM* at para. 50.

Sections 201(b) and 202 were cited by the Commission in its *Computer Inquiry* proceedings as primary safeguards for ensuring that ISPs obtain transmission services on nondiscriminatory terms and conditions – and these same provisions protect CLECs from unlawful discrimination."[81] The Commission also noted that Section 201(b) prohibits discrimination in rates, terms or conditions that would favor the carrier itself over a competing enhanced service provider.[82] If the underlying transport for broadband access services is not regulated as a Title II common carrier service, these protections against discrimination would disappear. As explained above, the concerns underlying the Commission's findings in the *Computer Inquiry* proceedings have not changed and are equally valid today. Accordingly, it remains essential that the underlying transmission component of broadband access services be classified as telecommunications services and be subject to Title II common carrier regulation.

### D. *Computer Inquiry* Safeguards Have Fostered Deployment Of Broadband, And Remain Necessary To Do So.

In its *NPRM*, the Commission seeks comment on the impact of the *Computer Inquiry* requirements on the deployment of broadband internet access services.[83] Elimination of these safeguards would harm, not help, the deployment of broadband services.

As the Commission has recently found, the deployment of advanced services to all Americans is proceeding in a "timely and reasonable manner," and the advanced services market "continues to grow."[84] Needless to say, this growth is occurring with the current *Computer Inquiry* safeguards in place. CLECs entering the market are investing in, and constructing, fiber

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81 *CPE/Enhanced Services Unbundling Order* at para. 46.

82 *Id.*

83 *NPRM* at para. 52.

optic networks designed to meet the high-speed data needs of today's consumers. In response to this competitive challenge, as previously shown, the ILECs also have been investing large amounts in upgrading their networks for the provision of advanced high-speed services, notwithstanding the common carrier regulations imposed on the provision of their services.

It is this competition that creates the incentive for ILECs to invest in and deploy advanced technologies, as the Commission has recognized.[85] It is regulatory safeguards, such as the *Computer Inquiry* safeguards, that protect and promote this competition, preventing the ILECs from using their dominant position to choke off competition. Without these safeguards, competition in the broadband market will wither and the ILECs will no longer have an incentive to invest in these advanced technologies, or to provide them at reasonable rates and terms.

### E. Performance Standards and Section 271 Compliance Are Not Adequate Substitutes for *Computer Inquiry* Safeguards

In its *NPRM*, the Commission seeks comment on whether the imposition of certain performance standards on the ILECs' provision of narrowband services would be sufficient to forgo the imposition of the *Computer Inquiry* safeguards on the ILECs' provision of broadband services.[86] The Commission also seeks comment on whether Section 271 compliance for entry into the long distance market would be an adequate substitute for the *Computer Inquiry* safeguards in the RBOCs' provision of broadband services.[87] Neither the imposition of

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84 *See In Re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, Third Report*, CC Docket No. 98-146, Commission 02-33 (rel. Feb. 6, 2002).

85 *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* CC Docket No. 98-146, Third Report (Feb. 6, 2002) at para. 133 (citing *Id.,* Second Report, 15 FCC Rcd 20913 at 21004 (2000)) ("competition, not regulation, holds the key to stimulating further deployment").

86 *NPRM* at para. 48.

87 *Id.*

performance standards, nor compliance with the Section 271 requirements is a sufficient substitute for the *Computer Inquiry* safeguards, which are separately necessary to prevent discrimination by the RBOCs in the provision of broadband access services.

The Commission's suggestion that RBOC narrowband performance standards may be an adequate substitute for the *Computer Inquiry* requirements ignores the fact that the RBOCs' performance levels in the delivery of *non-broadband* services are patently irrelevant to whether the *Computer Inquiry* safeguards are necessary to protect the *broadband* CLECs from discrimination with respect to the RBOCs' delivery of competing broadband services over bottleneck facilities. Even if an RBOC were meeting minimum performance standards in its provision of narrowband services, that fact alone would not mean that the RBOC is not engaging in systematic discrimination against competitors in the provision of broadband services, especially if there are no separate safeguards in place to protect competing broadband providers against such discrimination.

Broadband performance standards could usefully supplement existing *Computer III* safeguards, and the Commission should consider adopting them for this purpose. The Commission should be under no illusion, however, that performance safeguards even for broadband are a panacea. RBOC violations of existing performance standards have been rampant, as the RBOCs have again and again shown themselves willing to pay large fines rather than devote the resources needed to meet the standards. For example, Verizon paid $3.5 million in Performance Assurance Plan penalties for December 2000 and $3.8 million for January 2001 for failure to meet post-Section 271-review performance standards.[88] The RBOCs obviously

[88] *See* Verizon New York PAP/CCAP Market Adjustment summary, December 2000 and January 2001. http://238.11.40.241/east/wholesale/resources/res_ny_perf_assur_plan_results.htm

engage in a cost-benefit analysis, weighing such fines against (i) the benefits to the RBOCs of diverting resources elsewhere, such as obtaining Section 271 authority in other states, and (ii) the benefit to the RBOCs of hobbling CLECs. Substantive interconnection and unbundling rules remain necessary, then, as an additional enforcement mechanism and deterrent against RBOC misconduct.

Section 271 requirements also are not an adequate substitute for *Computer Inquiry* safeguards because they do not address the specific concerns underlying the need for the safeguards. They are also only applicable to RBOCs that choose to provide long distance service. Moreover, the Section 271 14-point competitive checklist focuses on interconnection and access to the RBOC's network facilities, including access to UNEs and unbundled local loops by CLECs.[89] Thus, Section 271 requirements fail to ensure that purchasers of ILEC access services under tariffs or interconnection agreements will be granted non-discriminatory access to the basic transmission services necessary to provide their broadband services.[90] In particular, Section 271 does not specifically require the RBOCs providing bundled basic and information services to separate the basic transmission services underlying the provision of broadband services and to make this transmission service available to competing broadband service providers. Applying the *Computer Inquiry* safeguards and 1996 Act unbundling requirements to broadband internet access services, however, would ensure such non-discriminatory access. Moreover, there is no guarantee that an RBOC will maintain those performance levels after a RBOC's Section 271 application is approved. As noted above, Verizon has paid large fines for

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89 *Id.*

90 As noted hereinabove, in a recent *Computer Inquiry* decision, the Commission found that notwithstanding the additional regulatory protections put in place by the 1996 Act, the *Computer Inquiry* safeguards were still necessary to protect enhanced service providers from discrimination.

noncompliance post-271-approval. For this reason, too, RBOC compliance with the Section 271 requirements is an inadequate substitute for the *Computer Inquiry* safeguards.

### F. Intermodal Competition Is Irrelevant to the Need for *Computer Inquiry Safeguards*

In *NPRM*, the Commission states that the "core assumption underlying the *Computer Inquiries* was that the telephone network is the primary, if not exclusive, means through which ISPs can obtain access to customers."[91] The Commission suggests that the *Computer Inquiry* safeguards may no longer be necessary to protect ISPs (and, by implication, CLECs) from discrimination because there are other network platforms, such as cable, wireless and satellite, over which customers can access broadband services.[92] Contrary to the Commission's suggestion, however, intermodal competition, such as it is, does not obviate the need for *Computer Inquiry* safeguards.

While *end-user customers* may in some instances have access to more than one platform for receiving broadband services, including cable modem service, CLECs and ISPs do not have ready access to such platforms for the provision of their services to their customers. First, cable companies are regulated under Title VI, not Title II of the Act, and have not been required to open their underlying transmission facilities to CLECs or ISPs insofar as they are providing cable service. With respect to cable modem services, the Commission recently found that cable modem service does not include an offering of telecommunications services to the public.[93] The Commission also found that the *Computer II* requirements governing the unbundling of

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91 *NPRM* at para. 36.

92 *Id.*

93 *See In Re Inquiry Concerning High-Speed access to the Internet over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking,* GN Docket No. 00-185, FCC 02-77 at paras. 45-47, 95 (rel. Mar. 15, 2002).

transmission facilities do not apply to cable operators providing cable modem services, and held that even if they did, the requirements would be waived on the Commission's own motion.[94] Even though a few cable operators are providing transmission services to unaffiliated ISPs or CLECs by choice[95] or pursuant to a government decree,[96] this access is extremely limited and available to only a few ISPs or CLECs. Moreover, differences between their respective customer bases render cable modem services, which focuses primarily on residential customers, an inadequate substitute for broadband access providers such as DSL.net which target business customers.

Platforms other than DSL and cable--wireless and satellite--are a red herring. They not only are still in their infancy, but, like cable, are not regulated as Title II common carriers. Thus, access to these transmission services also is not readily available to broadband access providers. Thus, as explained previously herein, the transmission facilities of dominant facilities-based common carriers still are the only ubiquitous means through which CLECs can obtain access to customers and therefore their primary means of providing service to their customers. Accordingly, intermodal competition does not reduce the need for application of Title II safeguards to ILECs.

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94 *Id.* at paras. 43-45.

95 *See* Comcast Corp, *Comcast and United Online to Offer NetZero and Juno High-Speed Internet Service* (press release), Feb. 26, 2002).

96 *See FTC AOL Time Warner Merger Order*, Federal Trade Commission, Docket No. C-3989, File No. 001 0105, §§ II, III (December 14, 2000).

## IX. CONCLUSION

For the reasons stated herein, the Commission should reject the reclassification set forth in the *NPRM*. The Commission should promptly conclude this proceeding consistent with DSL.net's recommendations.

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